introduced an affidavit made by one of the railway officials, requiring Ohle to give security for costs, on the ground that he was a non-resident of Iowa, in which affidavit it was alleged that Ohle was a non-resident.

On this state of facts the Circuit Court found that Ohle was not a resident of Iowa, so as to give the federal court jurisdiction on the ground of diversity of citizenship, and the case was remanded to the state court. This ruling was sustained by the United States Supreme Court, Chief Justice WAITE delivering the opinion.

EUGENE MCQUILLIN.

St. Louis, Mo.

Supreme Court of Minnesota.

ELLIOT *v.* SMALL.

A "reservation" is something newly created or reserved out of the thing granted, that was not *in esse* before.

An "exception" is a part of the thing granted, and of something *in esse* at the time of the grant.

A warranty deed conveyed a parallelogram of land "containing five acres," but "reserving from said grant a strip, thirty-three feet wide on the south side of said tract, for a public street." *Held*, that the fee to the strip thirty-three feet wide was in the grantee; and that if it was either an exception or reservation it was the latter.

APPEAL from the District Court of Hennepin county.

Shaw & Cray, for appellant.

Hart & Brewer, for respondents.

The opinion of the court was delivered by

BERRY, J.—The warranty deed involved in this case granted and conveyed "all the following described piece or parcel of land, * * * viz.: Beginning at the northeast corner of section thirty-four * * * thence westerly on the section line, nine chains and ninety-six links; thence southerly five chains and two links; thence easterly nine chains and ninety six links; thence northerly five chains and two links, to the place of beginning; * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract, for a public street, and a strip thirty-three feet in width, on the east side, which is now used and occupied as a public road and highway." The parallelogram of land thus described—nine chains and ninety-six links by five chains and two links—contains five acres, the quantity specified in the deed. The description is precisely that which is appropriate to the conveyance of the entire five acre tract; whereas, if the intention had been to exclude from the grant a strip thirty-three feet wide off of the south side of the five-acre tract,

then, inasmuch as the description is by distances, or dimensions of length and width, the more obvious, simple and natural way of exclusion would have been to describe the tract intended to be conveyed as being thirty-three feet narrower than the tract in fact described; that is to say, as being four chains and fifty-two links, instead of five chains two links in width.

It is difficult to see why, when he had adopted the plan of describing the property by its *width* in chains and links, the grantor should have specified a width greater than the actual width of the premises which he intended to convey, or why he should have embraced in the specified width thirty-three feet more than he intended to convey, simply for the purpose of taking it out again. The obvious and natural construction is that he meant to convey *all* that he described as a five-acre tract—nine chains ninety-six links long, by five chains two links wide.

This being the apparent intention of the grantor in his description of the five-acre tract, how is it affected by the so-called "reservation?" Certainly, that does not operate to except from the tract the *fee* of the thirty-three feet strip on the south side, for this would be inconsistent with the intention mentioned (if not repugnant, and therefore void), but to reserve an easement of right of way for a public street in and over the strip. As it did not except the fee, and the strip had never been used as a strip, and no street had ever been laid out or opened upon it at the time of the grant, the so-called "reservation" was not, strictly speaking, an *exception* of anything; for an *exception* is of a part of the thing granted, and of something *in esse* at the time of the grant. A "reservation" is defined to be something *in esse* newly created or reserved out of the thing granted, that was not *in esse* before; as, for instance, an easement: *Hurd* v. *Curtis*, 7 Met. 94; *Winthrop* v. *Fairbanks*, 41 Me. 312; Boone, Real. Prop. § 303. So that although the terms "exception" and "reservation" are often used indiscriminately, and the difference between them is in particular cases sometimes obscure and uncertain (*Bowen* v. *Conner*, 6 Cush. 132, and cases *supra*; *Roberts* v. *Robertson*, 53 Vt. 690), the so-called "reserving" of the thirty-three-feet strip in this case, "for a public street," would be a "reservation" proper (if anything), as distinguished from an "exception," properly so called. And right here, and upon this point, it is important to observe that the strip is reserved "for a public street." If the grantor intended to except the fee of the

strip from the grant, his intention was not expressed. The strip is "reserved" for a public street, and for nothing else. This does not require the exclusion of the *fee* of the strip from the grant, but only an easement; and upon the principle that a grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied.

Our construction of the deed, then, is that it passed to the grantee the fee of the whole of the five-acre tract: *Peck* v. *Smith*, 1 Conn. 103; *Richardson* v. *Palmer*, 38 N. H. 212; *Tuttle* v. *Walker*, 46 Me. 286; *Kuhn* v. *Farnsworth*, 69 Id. 404; *Hays* v. *Askew*, 5 Jones 63; *Cincinnati* v. *Newell's Heirs*, 7 Ohio St. 37. Whether the reservation was of no effect because it was to a stranger and not to the grantor, as held according to the old common law (*Hornbeck* v. *Westbrook*, 9 Johns. 73), or whether it is valid in favor of the public, as appears to be held or intimated in *Tuttle* v. *Walker*, and *Cincinnati* v. *Newell's Heirs*, *supra*, is a question with which the case at bar would appear to have no particular concern.

Order denying new trial affirmed.

Definition.—In Sheppard's Touchstone it is said that a "reservation is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before."

And afterwards, "this doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised, that was not *in esse* before; so that this doth always reserve that which was before, or abridge the tenure [tenor] of that which was before." Again, "it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or of the vesture of the land, or of a common or other profit to be taken out of the land, then those reservations are void:" p. 80. See Coke on Litt. 47 b; *Earl of Cardigan* v. *Armitage*, 3 D. & R. 414; 2 Barn. & Cress. 197; Bro. Abr. *Reservation*, p. 46; 19 Vin. Abr. 116, 126; *Craig* v. *Wells*, 11 N. Y. 321.

"An exception is something taken out of that which is before granted, by which means it does not pass by the grant, but is severed from the estate granted. A reservation is something issuing out of the thing granted, and not a part of the thing granted:" *Cunningham* v. *Knight*, 1 Barb. 407; *Gould* v. *Glass*, 19 Id. 192; *State* v. *Wilson*, 42 Me. 21; *Ryckman* v. *Gillis*, 6 Lansing 81; *Miller* v *Lapham*, 44 Vt. 434; *Parsell* v. *Stryker*, 41 N. Y. 483; *Dyer* v. *Sandford*, 9 Met. 395; *Kister* v. *Reeser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608. "Indeed, the books treat of an exception upon the theory that it is a re-grant by the grantee to the grantor of the estate described in the exception:" *Roberts* v. *Robertson*, 53 Vt. 690; s. c. 38 Am. Rep. 710; *Adams* v. *Morse*, 51 Me. 497.

Rule of Construction.—"It is a rule of construction, that where there is a grant

and an exception out of it, the words of the exception are to be considered as the words of the grantor, and are to be construed in favor of the grantee:" per HOLROYD, J., *Bullen* v. *Denning*, 5 B. & C. 850, see *Woodroff* v. *Greenwood*, Cro. Eliz. 518; *Earl of Cardigan* v. *Armitage*, *supra*, p. 208; *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. 538; s. c. 14 Am. Rep. 322; *City of Waterloo* v. *Union Mill Co.*, 59 Iowa 437; s. c. 13 N. W. Rep. 433; *Duryea* v. *Mayor, &c., of City of New York*, 62 N. Y. 592.

In the absence of express stipulation, the grantor of a part of a tenement retains no rights of any nature over the part granted: *Suffield* v. *Brown*, 4 DeG., J. & S. 194; *Wheeldon* v. *Burrows*, 12 Ch. Div. 31; *Russell* v. *Watts*, 25 Id. 559.

The use of the word "reserve" does not always give the deed the effect of a reservation; nor does the use of the word "except" turn a reservation into an exception. In speaking of a reservation Coke says, "sometimes it hath the force of saving or excepting, so as sometimes it serveth to reserve a new thing, viz., a rent, and sometimes to except part of the thing *in esse* that is granted:" Coke on Litt. 143 a.

Thus where the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c., subject to a *reservation* to the defendant of all pits in the close, with liberty to carry away the produce of the pits, BAYLEY, J., said it was not a reservation, but an exception, and held the plea bad: *Fancy* v. *Scott*, 2 Man. & Ryl. 335.

So where Sir Thomas Denby enfeoffed the Earl of Sussex of certain closes, *except* and always *reserved* out of the said feoffment to the said Sir Thomas all the coals in all or any of said land, together with the free liberty to sink and dig pits, this was held to constitute an exception: *Earl of Cardigan* v. *Armitage*, *supra*.

So where a clause in a lease purported to *reserve* underwood and underground produce, it was held to enure as an exception, and not as a reservation: *Douglas* v. *Lock*, 4 Nev. & Man. 807.

Even though words of reservation be used they will be construed as an exception, if such was the design of the parties: *Kister* v. *Reeser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608.

Thus where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon-road to haul the coal therefrom as wanted," it was held that the saving clause operated as an exception of the coal. The coal was land and the reservation of that part of the land excepted from the grant. It was a thing corporate, existing when the grant was made, and differed from something newly created, as rent or other interest strictly incorporeal: *Whitaker* v. *Brown*, 10 Wright (Pa.) 197; *Heflin* v. *Bingham*, 56 Ala. 566; s. c. 28 Am. Rep. 776; *Hoit* v. *Stratton Mills*, 54 N. H. 109; s. c. 20 Am. Rep. 119. See *Marvin* v. *Brewster Mining Co.*, 55 N. Y. 538; s. c. 14 Am. Rep. 322; *Knotts* v. *Hydrick*, 12 Rich. 314. So where a deed to a railroad company contained a clause "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," it was held to confer on the grantor a new right not previously vested in him, operative as a reservation and not as an exception, and vesting only an estate for life: *Ashcroft* v. *Eastern Rd.*, 126 Mass. 196; s. c. 30 Am. Rep. 672.

And where a deed *reserved* to the grantor "the right of mining on the above-granted premises, for the use of said company [the grantor], an amount of ore not exceeding 7000 tons annually, at a duty of thirty-seven and one-

half cents per ton, including all the facilities needful for doing the same," it was construed as a reservation of new rights to the grantor, out of the granted premises: or else as the creation of such new rights by force of words of reservation, taking effect either by way of estoppel, or as a grant from the grantee by implication of law from the acceptance of the deed: *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

So a defeasance may operate as a reservation in favor of the grantor: *Jackson* v. *McKenny*, 3 Wend. 233; s. c. 20 Am. Dec. 690.

A very good illustration of a reservation is reserving the right of light and air to pass over the land sold so as to reach land still owned by the grantor: *Gay* v. *Walker*, 36 Me. 54; s. c. 58 Am. Dec. 734.

A deed described a tract of land without any reference to a stream included within the bounds. It then proceeded as follows: "And it is to be understood, and it is the intention of this deed, to convey to the said A. C., as much of the privilege of the water as shall be sufficient for the use of a fulling mill, or a bark-mill, whenever there is a sufficiency therefor." This was held to be a reservation of the surplus water, and not void, for inconsistency with the granting clause: *Sprague* v. *Snow*, 4 Pick. 54.

Where the covenants of warranty in a deed were followed by the clause "except all the wheat on the ground or land as above described," the deed was construed as not reserving the wheat to the grantor but as excepting it from the warranty: *Knapp* v. *Woolverton*, 47 Mich. 292; s. c. 11 N. W. Rep. 164.

A deed conveyed "all that piece or parcel of land described as follows, to wit, being the northeast quarter of section 32, except forty acres in the southeast corner of said section." It was held that the deed did not convey the forty acres excepted: *Babcock* v. *Lattermer*, 30 Minn. 417; s. c. 15 N. W. Rep. 689.

A. claimed an island under a survey and patent describing it as containing four acres and twenty perches, strict measure, and describing it by courses and distances only. He conveyed the same quantity by the same description, "excepting and reserving twenty perches at the upper end of said island." Leases had been made at different times of a certain twenty perches. It was held that these twenty perches were to be considsidered as having been excepted from the deed: *Hartley* v. *Crawford*, 81 Penn. St. 478.

The defendant, by a warranty deed, conveyed to the plaintiff's grantor a certain piece of land, reserving the right to enter upon a portion of it "at all times thereafter, so long as the clay and sand may last or be used for brick-making purposes," and to dig and take therefrom the clay and sand that may be found thereon fit for brick-making. In digging and removing clay and sand, within the boundaries of the portion described, some of the adjoining land fell into the excavation. It was held, in an action for an injunction, that the clause was a reservation and not an exception; that the defendant was entitled to exercise the rights reserved anywhere within the boundaries of the parcel described; that the doctrine of lateral support did not apply; and that the plaintiff could not maintain his action: *Ryckman* v. *Gillis*, 57 N. Y. 68.

By deed certain premises were conveyed to a religious society, and a right to build a basement story upon the premises, to be used solely for the purposes of a school, with a right of passage to and from it, was reserved. The grantee was to build a church upon the basement walls; and a privilege was given to him to purchase the basement. It was held that the deed vested the fee in the grantee, with the reservation of an easement merely: *Reformed Church of Gallupville* v. *Schoolcraft*, 65 N. Y. 134, reversing same case, 5 Lans. 206.

Reserving Timber.—It is no uncommon thing for timber to be reserved by the grantor of a deed. Usually there is a limitation imposed upon the length of time the grantor shall have to remove it. Thus where both the standing and lying timber was reserved, to be removed within one year, the right of removal was held to be limited to that time, but the manufacture of such timber into stave-bolts on the premises authorized its removal after that time: *Golden* v. *Glock*, 57 Wis. 118; s. c. 46 Am. Rep. 32. In such a case "the absolute right of property in the trees was not excepted out of the estate granted, but only a right reserved to enter within the time limited, to cut and remove the same:" *Rich* v. *Zeilsdorff*, 22 Wis. 544; *Martin* v. *Gilson*, 37 Wis. 360; *Strasson* v. *Montgomery*, 32 Id. 52.

A like decision was rendered in Pennsylvania, where the reservation was the right to cut "at any and all times, also the right of ingress and egress at any and all times, for the space of twelve years from the date above written, for the purpose aforesaid:" *Saltonstall* v. *Little*, 90 Penn. St. 422; s. c. 35 Am. Rep. 683, citing Bacon's Abr., tit. *Grant*.

So where the reservation was of all the timber suitable for rafting and sawing of every description, and no limit of time was imposed, it was held that "the grant was in its very nature determinable; the right to cut timber was not to continue for ever at the pleasure of the grantee and his assignee; and if from the destruction of the trees, the subject of it, or the refusal of the party to exercise his right after a reasonable notice to do so, the right itself is determined, the privilege of entry is gone with it, and the owner of the land may sue for breach of close, though he may not recover in damages the value of trees taken, the property of which is not in him: *Boults* v. *Mitchell*, 3 Harris (Pa.) 371.

In an early case in Maine it was held that the right of the grantor was limited by the time specified, because any other rule would be highly injurious: *Pease* v. *Gibson*, 6 Me. 84; *Howard* v. *Lincoln*, 13 Id. 122.

In Vermont stone was reserved to be removed within a time certain. The court said: "If the property was removed by that time, it belonged to the plaintiffs; but if not removed by that time their right to it was gone. This seems to be the natural and obvious construction of the deed: *Holton* v. *Goodrich*, 35 Vt. 19. The same principle has been ruled in New York: *Boisaubin* v. *Reed*, 2 Keyes 323; s. c. 1 Abb. Ct. Dec. 161; see also *McIntyre* v. *Barnard*, 1 Sandf. Ch. 52; *Warren* v. *Leland*, 2 Barb. 622.

For a continuous reservation, see *Clap* v. *Draper*, 4 Mass. 266; *Prescott* v. *Pulsifer*, 10 Gray 49.

But there are cases holding a different view of this question. Thus where the deed reserved the timber, the grantee stipulating that the grantor should have two years to remove it, it was held that it might be removed after that time. It was said that there was no expressed intention of the parties that a failure to remove it within two years should work a forfeiture; and no such inference could be drawn from the nature of the transaction: *Irons* v. *Webb*, 12 Vroom 203; 32 Am. Rep. 193.

Roadway.—It is no uncommon thing for a roadway to be reserved over or along a tract conveyed. Where a reservation of a right of way along the bank of a river was made, it was held not to withhold the freehold of the road-bed from the grantees of the land over which the road ran. In such a case the title vests subject to the easement: *Hagan* v. *Campbell*, 8 Port. (Ala.) 9; s. c. 33 Am. Dec. 267.

So where a deed conveyed a certain farm by metes and bounds, "reserving to the public the use of the road through said farm; also, reserving to the White

Mountain Railroad the roadway for said road, as laid out by the railroad commissioners; and also reserving to myself the damages appraised for said railroad way by the commissioners and selectmen," it was held that the intention of the grantor was to convey to the grantee the lands over which the public highway and railroad had been laid out and established, subject only to the right of way of the public in the highway and in the railroad way as laid out, reserving to himself the damages: *Richardson* v. *Palmer*, 38 N. H. 212. See *Leavitt* v. *Towle*, 8 Id. 96; *Winthrop* v. *Fairbanks*, 41 Me. 311; *Bridger* v. *Pierson*, 45 N. Y. 601.

In a deed, a reservation of "a road ten feet wide along the line of Joseph Burger, to be shut at each end," was held to carry only a right of way and not the fee of the strip of the land: *Kister Reeser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608.

So a reservation of the right to open a highway "the whole length of the east line; and if a public highway shall be laid out, all the rights of the grantor in said reserved highway are to pass to the grantee," was held to reserve the right to dedicate a highway, the fee therein to belong to the grantee: *Dunn* v. *Sandford*, 51 Conn. 443.

A grant of land was made, "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as have been lawfully taken for a public road." It was held that the fee in the soil of the road, and not merely an easement, was reserved to the grantor: *Munn* v. *Worrall*, 53 N. Y. 44; s. c. 13 Am. Rep. 470. See *Peck* v. *Smith*, 1 Conn. 103; *Craig* v. *Wells*, 11 N. Y. 315.

How created.—If reservation of inheritance is intended to be made, then the deed must be as specific in the words of reservation as if it was intended to convey an estate of inheritance. A reservation to the grantor alone will be the reservation of a life estate only: *Ashcroft* v. *Eastern Rd.*, 126 Mass. 196; s. c. 30 Am. Rep. 672; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

It cannot be created by parol: *Wickersham* v. *Orr*, 9 Iowa 253; *Bond* v. *Coke*, 71 N. C. 97; *Wilder* v. *Wheeldon*, 56 Vt. 344; *Strout* v. *Harper*, 72 Me. 270. Where, however, the use of the usual words of inheritance in a common-law deed are dispensed with by a statute, they need not be used in the reservation: *Karmuller* v. *Krotz*, 18 Iowa 358.

So if the reservation is such a one as is appurtenant to the land conveyed, or to land yet owned by the grantor, words of inheritance need not be used: *Winthrop* v. *Fairbanks*, 41 Me. 309; *Smith* v. *Ladd*, Id. 314; *Burr* v. *Mills*, 21 Wend. 290; *Borst* v. *Empie*, 1 Seld. 33; *Cathcart* v. *Bowman*, 5 Barr (Pa.) 317; See *Garrison* v. *Rudd*, 19 Ill. 558.

Since an exception is the creation of no new right in the grantor, but simply allows him to have that which he had before—leaving the fee in him as it was before the deed by him was executed—it would seem that no words of inheritance are necessary to create an exception for a period longer than the lifetime of the grantor. But this distinction seems to have been overlooked.

In *Horneby* v. *Clifton*, Dyer 264 b, it is stated that words of inheritance should be used in an exception, although the case before the court was a reservation. So the same is said in a note to this case, citing an old case.

Sheppard's Touchstone lays down the same rule, citing the *Dyer Case*, 100.

So in Massachusetts, in a case of a reservation, the rule is said to apply to an exception: *Curtis* v. *Gardner*, 13 Met. 457; and afterwards in a case of an exception this statement was adhered to: *Jamaica Pond Aqueduct Corporation* v. *Chandler*, 9 Allen 159.

The reservation or exception may be created by a reference to another deed

containing it: *French* v. *Carhart*, 1 N.Y. 96.

Reservation must be to Grantor.—It has been said that a *reservation* to be good must be to the grantor; and "it is not the less made to him if others can derive advantage from it. It will be considered as made to him when valuable rights are secured to him, although it may be perceived that others may also be benefited by it:" *Gay* v. *Walker*, 36 Me. 54; s. c. 58 Am. Dec. 734; *Hill* v. *Lord*, 48 Me. 95; *Bridger* v. *Pierson*, 45 N.Y. 601; *West Point Iron Co.* v. *Reymert*, 45 N. Y. 707; *Borst* v. *Empie*, 1 Seld. 33; *Karmuller* v. *Krotz*, 18 Iowa 358; *Moore* v. *Earl of Plymouth*, 3 B. & A. 66; *Hornbeck* v. *Westbrook*, 9 Johns. 73; *Craig* v. *Wells*, 11 N. Y. 318; *Barber* v. *Barber*, 33 Conn. 335.

Even a reservation by one tenant in common, conveying his interest to himself of a right of way over the land held in common, is void: *Marshall* v. *Trumbull*, 28 Conn. 183; s. c. 73 Am. Dec. 667.

But a reservation to him and his cotenant is good: *Pettee* v. *Hawes*, 13 Pick. 323. See, generally, *Bridger* v. *Pierson*, 45 N. Y. 601.

"A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved:'" *West Point Iron Co.* v. *Reymert*, 45 N. Y. 707.

Out of the thing granted.—So a reservation must be out of the thing granted. It cannot be out of a thing not granted, for there is nothing for it to operate upon: *Hurd* v. *Curtis*, 7 Met. 110; *Hathaway* v. *Payne*, 34 N. Y. 92.

But "a grantor may except lands, either because he does not own and cannot convey them, or because he does not intend to convey them if he is the owner:" *People* v. *Rector, &c., of Trinity Church*, 22 N. Y. 44, 53. Yet in another case in the same state it is said that "an exception to be good 'must be a part of the thing granted and not of some other thing,'" citing Shep. Touch. 78; Co. Litt. 47; 1 Atkinson on Conveyances 322; and 2 Prest. on Con. 462; *Mathews* v. *Mathews*, 3 Am. L. Reg. (O. S.) 119.

A. conveyed to B. "the undivided half of lot 10," excepting therefrom "so much of said premises as may have heretofore been conveyed (if any) by the party of the first part to M." The previous deed from A. to M. was a quitclaim for a parcel of ground included in lot 10; but at the time of its execution, A. had no title to any part of the lot. It was held that B. took the undivided half of lot 10, as if no exception had been expressed in the deed to him: *Blossom* v. *Ferguson*, 13 Wis. 75.

When void.—"But if the reservation embraces all these things, it is as extensive as the grant, and therefore void:" *Dunham* v. *Kirkpatrick*, 101 Penn. St. 36; s. c. 47 Am. Rep. 696; *Pynchon* v. *Stearns*, 11 Met. 312; s. c. 45 Am. Dec. 210; *Hurd* v. *Hurd*, 64 Iowa 414; s. c. 20 N. W. Rep. 740. And it has been held that there cannot be reserved in a grant that which will deprive the grantee of the enjoyment of the whole thing granted, and that a clause to that effect must be rejected as absurd and repugnant to the deed; *Hilton* v. *Ld. Granville*, 5 Q. B. 701. But this case has been questioned and finally overruled: *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; *Duke of B.* v. *Wakefield*, L. R., 4 H. L. 377. See *Hext* v. *Gill*, L. R., 7 Ch. App. 700.

So one cannot sell land in fee and reserve to himself the right to the price to be obtained on his grantee's sale: *Dennison* v. *Taylor*, 15 Abb. N. Cas. 439

So an exception may be made to depend, either for its existence or continu-

ance, on a condition: *Irons* v. *Webb*, 12 Vroom 203; s. c. 32 Am. Rep. 193.

Where a warranty deed was conditioned for a reservation of all the grantor's right, title and interest for life, this was held to be a valid reservation: *Gravers* v. *Atwood*, 52 Conn. 512; s. c. 52 Am. Rep. 610; *Webster* v. *Webster*, 33 N. H. 18; *contra*, *Ward* v. *Ward*, 2 Haywood (N. C.) 28, an exception held void; also, in *In re Young*, 11 R. I. 636.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Tennessee.

PARKER v. STATE.

The carrying on of one's ordinary business on Sunday, is an indictable offence at the common law, and also under the statutes of Tennessee, if conducted so openly as to attract public observation and tend thereby to the corruption of public morals.

It is no defence against such a prosecution that the accused conscientiously believes in observing, and actually observes, the "seventh" rather than the "first" day of the week as the Sabbath.

APPEAL from Circuit Court, Henry county.

Indictment and conviction for violating the "Sunday law" by carrying on ordinary business as a blacksmith. Exceptions, and appeal by the respondent.

Cole, Sweeney & Ward, for plaintiff.

The Attorney-General, for the state.

The opinion of the court was delivered by

DEADERICK, C. J.—Parker was convicted in the Circuit Court of Henry county, for following and exercising his avocation of blacksmith, upon Sunday, in April 1885, and on divers other Sundays before that date, and up to the time of taking this inquisition; and the indictment avers said work was a disturbance and nuisance to the good citizens of said county; and it averred that such work was not necessary, or a matter of charity. Another count charges that Parker was guilty of a public nuisance by such work on Sunday, to the prejudice of the public morals, contrary to the statute, &c. The proof upon the trial was, that the defendant was a blacksmith, having a shop near Springville, in said county, and numerous witnesses testify to having seen him at work at his trade, in his shop, upon different Sundays, within twelve months before the finding of the indictment. One witness said he knew defendant worked at his business every Sunday.

The defendant's counsel insisted that, although it is proved that